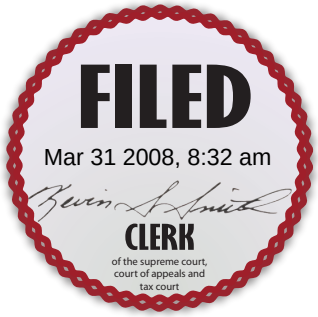

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IN THE
COURT OF APPEALS OF INDIANA

CORDELL LASTER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0708-CR-725
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William Robinette, Master Commissioner
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0703-FC-38947

March 31, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Cordell Laster appeals following his conviction pursuant to a guilty plea for Auto Theft as a Class C felony,[1] for which he received a six-year sentence with four years executed in the Department of Correction. On appeal, Laster challenges his sentence by claiming that the trial court abused its discretion in (1) considering an element of the offense as an aggravating circumstance, and (2) failing to find mitigating circumstances which he alleges were clearly supported by the record. Laster further claims his sentence is inappropriate in light of the nature of his offense and his character. We affirm.

FACTS AND PROCEDURAL HISTORY

According to the factual basis entered at the time of the plea hearing, on March 7, 2007, Laster exerted unauthorized control over a 1996 Cadillac automobile belonging to Russell Myers with the intent to deprive Myers of the Cadillac's value and use. As of that March 2007 date, Laster had been convicted of a prior auto theft offense, specifically on May 18, 1994.[2] On March 8, 2007, the State charged Laster with auto theft as a Class C felony and with operating a vehicle having never received a license. On July 6, 2007, Laster entered into a plea agreement whereby he agreed to plead guilty to Class C felony auto theft, and the State agreed to dismiss the additional count of operating a vehicle having never received a license. During a July 10, 2007 plea hearing, the trial court entered judgment of conviction against Laster for auto theft.

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[1] Ind. Code § 35-43-4-2.5 (2006).

[2] Pursuant to Indiana Code section 35-43-4-2.5(b), this prior auto theft conviction, entered under Cause Number 49G04-9401-CF-010778, was used to enhance Laster's auto theft charge from a Class D felony to a Class C felony.

On July 20, 2007, the trial court sentenced Laster to six years, with four years executed in the Department of Correction. In sentencing Laster, the trial court considered the aggravating circumstance of his criminal history, which included the May 18, 1994 auto theft conviction used to enhance his auto theft conviction to a Class C felony. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Laster claims the trial court abused its discretion by relying upon an element of his offense, specifically his May 18, 1994 conviction for auto theft, as an aggravating circumstance and by failing to consider certain mitigating circumstances which he claims were clearly supported by the record.

I. Abuse of Discretion

Sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion. *Anglemyer v. State* (*Anglemyer I*), 868 N.E.2d 482, 490 (Ind. 2007). In *Anglemyer I*, the Supreme Court held that Indiana trial courts are required to enter sentencing statements whenever imposing sentence for a felony offense. 868 N.E.2d at 490. The statement must include a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Anglemyer I*, 868 N.E.2d at 490. If the recitation includes a finding of aggravating or mitigating circumstances, then the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id*. A trial court may abuse its discretion if it fails to enter a sentencing statement at all. *Id*. A trial court may also abuse its discretion if it explains reasons for

imposing a sentence—including a finding of aggravating and mitigating factors if any—but the record does not support the reasons, or the sentencing statement omits reasons that are clearly supported by the record and advanced for consideration, or the reasons given are improper as a matter of law. *Id.* at 490-91. Under those circumstances, remand for resentencing may be the appropriate remedy if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record. *Id*. at 491.

A. Aggravator

Laster is correct that a trial court may not use a factor constituting a material element of an offense as an aggravating circumstance. *See Henderson v. State*, 769 N.E.2d 172, 180 (Ind. 2002). Although the trial court mentioned the May 1994 conviction used to enhance Laster's conviction to a Class C felony during its recitation of his criminal history, the court did not emphasize this particular conviction or indicate that it counted significantly toward the court's consideration of Laster's criminal history as an aggravating factor. To the extent the trial court did rely upon this May 1994 conviction, we can say with confidence that the court would have imposed the same sentence without considering it. Laster's adult criminal history, as recited by the trial court, included two additional prior felony auto theft convictions, a Class C felony conviction for carrying a handgun without a license, a Class D felony conviction for marijuana possession, and multiple misdemeanor convictions for marijuana possession and driving offenses. We find no reversible error on this point. *See Hatchett v. State*, 740 N.E.2d 920, 928 (Ind. Ct. App. 2000), *trans. denied* (stating that although factor constituting material element of

crime cannot be considered aggravating circumstance, remainder of defendant's criminal history is valid aggravator).

B. Mitigators

Laster additionally claims that the trial court abused its discretion by failing to consider as mitigating circumstances the undue hardship of his incarceration on his dependents, his guilty plea, and his expression of remorse. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is not only supported by the record but also that the mitigating evidence is significant. *Anglemyer v. State* (*Anglemyer II*), 875 N.E.2d 218, 220-21 (Ind. 2007). The hardship to a defendant's dependents is not always a significant mitigating factor. *McElroy v. State*, 865 N.E.2d 584, 592 (Ind. 2007). Here, Laster was somewhat equivocal when asked the number of children he had,[3] the pre-sentence investigation report ("PSI") indicated Laster had never established paternity of the children, he was not under court order to support them, and at the time of Laster's arrest for the instant offense, he was living with and supported by his mother. We find no abuse of discretion in the trial court's failure to consider the alleged hardship to Laster's dependents as a significant mitigating factor.

With respect to his guilty plea, the Indiana Supreme Court has held that a defendant who pleads guilty deserves "some" mitigating weight be given to the plea in return. *Anglemyer II*, 875 N.E.2d at 220. The significance of a guilty plea as a mitigating

[3] Defense counsel asked Laster how many children he had, and Laster answered, "Like nine." Tr. p. 16.

factor varies from case to case. *Id*. at 221. For example, a guilty plea may not be significantly mitigating when it does not demonstrate the defendant's acceptance of responsibility or when the defendant receives a substantial benefit in return for the plea. *Id*. Here, according to the probable cause affidavit as reported in the PSI,[4] Laster was pulled over while driving a stolen car, and he handed his identification to police. In addition, in pleading guilty, Laster received the benefit of the State's dropping its charge of operating a vehicle having never received a license. Given the strength of the State's case against him and the benefit he received from the plea, Laster's guilty plea may have been as much a pragmatic decision as an effort at taking responsibility. We find no abuse of discretion in the trial court's failure to consider Laster's guilty plea to be a significant mitigating factor.

As to Laster's expression of remorse, the record merely shows that Laster briefly indicated to the trial court that he was "sorry for what [he had] done." Tr. p. 16. The trial court had the ability to observe Laster directly and was in a better position than we to determine the sincerity of his statements. *See Corralez v. State*, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Given this record, we find no abuse of discretion in the trial court's determination that Laster's alleged remorse was not a significant mitigating circumstance.

II. Appropriateness of Sentence

With respect to Laster's claim that his sentence was inappropriate in light of his character and the nature of his offense, we observe that Article VII, Sections 4 and 6 of

[4] At the sentencing hearing, Laster indicated that the PSI was accurate.

the Indiana Constitution "'authorize[] independent appellate review and revision of a sentence imposed by the trial court.'" *Anglemyer I*, 868 N.E.2d at 491 (quoting *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006) (emphasis and internal quotations omitted)). Such appellate authority is implemented through Indiana Appellate Rule 7(B), which provides that the "Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." We exercise deference to a trial court's sentencing decision, both because Rule 7(B) requires that we give "due consideration" to that decision and because we recognize the unique perspective a trial court has when making sentencing decisions. *Stewart v. State*, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). It is the defendant's burden to demonstrate that his sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

We are unconvinced that the nature of the instant offense, which is Laster's fourth conviction for auto theft, somehow favors a lesser sentence than the six years he received. As for Laster's character, his criminal history referenced above reflects sufficiently poorly upon his character such that we are unconvinced that his six-year sentence is inappropriate.

Having rejected Laster's challenge to the trial court's discretion in imposing his sentence, and having determined that his sentence is not inappropriate, we affirm Laster's six-year sentence.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.